

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39131
Docket No. CL-39926
08-3-NRAB-00003-070098
(07-3-98)

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

PARTIES TO DISPUTE: ((Transportation Communications International Union
(Indiana Harbor Belt Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood (GL-13172) that:

- (a) The Carrier violated the Indiana Harbor Belt Railroad Clerks rules agreement, effective December 1, 1949, as amended; the Railway Labor Act; as well as the Fourth Amendment to the Constitution of the United States when it arbitrarily required Claimant E. Hult to submit to a toxicological test on January 27, 2005, as part of a so-called clinical evaluation because Claimant was absent from work on January 25, 26, and 27, 2005, and as a result thereof he was withheld from service;**
- (b) Whereas, nothing in our collective bargaining agreements give the Carrier the right to violate the Constitution of the United States (search and seizure), as well as illegally extracting fluids from the human body.**
- (c) Whereas, nothing in our collective bargaining agreements give the Carrier the right to test clerical employees in this way;**
- (d) Whereas, nothing in our collective bargaining agreements or the FRA or the FHWA or the IHB'S policy regarding testing during certain medical examinations will substantiate this unauthorized illegal extraction (Policy attached;)**

- (e) Therefore, Claimant Eric Hult shall now be allowed eight (8) hours pay at the appropriate pro-rata rate for each day withheld from service beginning February 8, 2005, and continuing for each successive day thereafter until properly returned to active service as well as any other compensation that would have been due or otherwise available to Claimant during the aforementioned period on account of this violation; and
- (f) This claim is presented in accordance with Rule 13 and should be allowed.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was employed by the Carrier on November 22, 1976, and at all relevant times held the position of Yard Clerk.

The record discloses the fact that the Claimant was scheduled to report for work on January 25 and 26, 2005. The record also discloses the fact that the Claimant failed to report for work on those dates or to contact the Carrier prior to his shift or at any other relevant time to indicate that he was not going to report for work. As a direct result of the Claimant's no-call, no-show action, the Carrier

directed him to report for a clinical evaluation on January 27, 2005. The Carrier based its decision to have the Claimant clinically evaluated due to its concern that as a Yard Clerk, the Claimant was required, among other responsibilities, to walk the yards at times to check cars, and accordingly, the Carrier felt duty bound to insure that the Claimant was medically fit to perform the essential functions of his job. The record established that as a regular part of any clinical evaluation, employees are drug tested. Accordingly, the Claimant, as part of his clinical evaluation, submitted a urine sample to be drug tested. The drug test was conducted by an independent laboratory using a gas chromatography/mass spectrometry (GC/MS) analysis. As required by federal regulation as well as Company Policy, the laboratory results were then reviewed by a Medical Review Officer (MRO) who confirmed the test as positive for the presence of cocaine. The MRO so informed the Claimant as well as the Carrier's representative. By letter dated February 8, 2005, the Carrier advised the Claimant that he was "[m]edically disqualified from service as of February 7, 2005." The Claimant was also advised that he was to rid his system of cocaine as well as other prohibited substances within 45 days, or by March 25, 2005 and provide the Carrier's Medical Examiner with a negative urine sample. He was to contact the IHB's Counseling Service Manager and by June 8, 2005, he was to have completed the initial phase of the treatment plan, developed in conjunction with the IHB Substance Abuse Professional and submit negative urine and breath samples as part of a return to duty medical examination with a physician on contract with the IHB to provide medical services. His failure to comply with the foregoing could subject him to dismissal.

The Claimant's failure to comply with the instructions set forth in the February 8 letter prompted the Carrier to send him a letter dated June 14, 2005 directing the Claimant "[t]o contact the Employee Assistance Program vendor . . . make an appointment with a counselor and complete a face-to-face evaluation with a substance abuse professional on or before June 30, 2005. . . Failure to present yourself for this evaluation on or before June 30, 2005, may be construed by the Carrier as a failure to comply with instructions, which may jeopardize your status as an employee." The Claimant did as instructed, and the Substance Abuse Professional informed the Carrier in writing on August 19, 2005 that the Claimant could be returned to service, pending a medical examination which included a urine sample and breath alcohol test. The Claimant was subsequently medically

evaluated, and his urine sample tested negative, thus qualifying the Claimant to return to service on August 29, 2005.

In light of the foregoing facts, the Organization argues that the Claimant was the subject of disciplinary action, and that the Carrier's action in labeling the Claimant as "medically disqualified" was a ruse, designed to remove the Carrier from its obligations under Rule 36 – Discipline. It is therefore the Organization's burden in the first instance, under the preponderance of the evidence standard, to demonstrate that under the facts and circumstances at bar, it is more likely than not that the Claimant was the subject of disciplinary action.

As an initial matter, the Board holds that it is not entrusted with the authority to make determinations where, as here, specific rights under the United States Constitution have been challenged. That the Board leaves to the Courts. The Board is, however, entrusted with making a determination as to whether, under the stated and accepted facts, the Carrier's actions violated any specific Rule(s).

As to the issue regarding an alleged Rule violation, the Board carefully reviewed the record in this case, including all cases referenced therein. Upon such review, the Board finds, for the reasons noted below, that there has been no Rule violation in this case.

Since the Carrier's Drug and Alcohol Policy became effective in 1996, there have been numerous cases involving drug and alcohol violations between these very parties that have gone before the Board where the Carrier's action was upheld. Thus, in Third Division Award 33652, the Board recognized the Carrier's right to administer a drug test as part of a promotional requirement, and upheld the claimant's termination when he tested positive for a second time. In Third Division Award 34206, the Board recognized the Carrier's right to administer a drug test as part of a return-to-work examination, and upheld the claimant's termination when he tested positive for a second time. In Third Division Award 37731, the Board recognized the Carrier's right to administer a drug test in connection with a fitness for duty physical, and upheld the claimant's termination when he tested positive for a second time. It is significant to note that in each of these cases, the Carrier's right to administer a drug and/or alcohol test in the first instance was upheld, and there was

no imposition of discipline until there was a second positive drug test result within the proscribed period. Accordingly, given the facts before the Board, we cannot conclude that the Claimant was "disciplined" when he was removed from service following his first positive drug test result. Nor can the Board, under the facts submitted, conclude that the Carrier's actions were arbitrary, capricious, or discriminatory. It was the Claimant's no-call, no-show action that prompted the Carrier to direct the Claimant, who holds a very responsible position, to a medical evaluation. Moreover, there is nothing in the record that conclusively establishes that a drug test is not part of a routine medical evaluation.

Public Law Board No. 4024, Award 13, which was relied upon by the Organization, does not change our decision in this matter. In Award 13, under a policy requiring all employees returning from furlough to submit to a physical examination, part of which included a drug test, the claimant therein tested positive for cannabinoids. The claimant followed all instructions issued by the Carrier and was returned to work following a negative drug test. Subsequently, the claimant was randomly tested and tested positive for THC. He was removed from service as medically disqualified pending charges. Following an Investigation, the claimant was dismissed. In its review, the Board concluded, in relevant part:

"Nothing has been presented to the Board on this case that would suggest, permit or compel a conclusion that Carrier violated an expressed term of the agreement between the parties or some established past practice between the parties. We find no merit to that portion of Organization's argument. Claimant was found to be medically disqualified for evidencing the presence of THC in his system. We cannot conclude that that medical standard established by Carrier on this property is unreasonable in view of the mission of Carrier, nor is there any evidence suggesting that the medical standard was applied disparately or was somehow lacking in uniformity."

Notwithstanding the foregoing conclusion, PLB 4024 concluded that the claimant's due process rights were violated when the Hearing Officer's unreasonable control of the Investigation effectively prohibited the Claimant from cross examining

an adverse witness. In Award 13, as in the instant matter, it is significant that the matter reached the discipline stage when the Claimant had a second positive drug test result within the proscribed period. This is clearly not the case in the instant matter.

For the reasons noted and discussed above, we find the Organization's claim unsupported by the record evidence. Accordingly, it must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 7th day of July 2008.